[redacted]

No. 91-[redacted]

[redacted]

[redacted]

October Term, 1991

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[redacted]

v.

[redacted]

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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[redacted]

*Solicitor General*

[redacted]

*Assistant Attorney General*

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

## QUESTION PRESENTED

Whether the district court erred in its interpretations of a consent decree.

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# In the Supreme Court of the United States

OCTOBER TERM, 1982

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No. 81-2331

COMMONWEALTH OF PENNSYLVANIA, ET AL., PETITIONERS

*v.*

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17a-43a) is reported at 674 F. 2d 976. The opinions and orders of the district court (Pet. App. 1a-16a) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on March 1, 1982, and a petition for rehearing was denied on March 26, 1982 (Pet. App. 44a-45a). The petition for a writ of certiorari was filed on June 21, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

The Clean Air Act of 1970, 42 U.S.C. 1857 *et seq.*, required each state to submit to the Environmental Protection Agency (EPA) a state implementation plan for reducing air pollution to meet certain national standards. 42

U.S.C. 1857c-5. Petitioner Commonwealth of Pennsylvania submitted a plan that included, among other things, an inspection and maintenance (I/M) program for automobile emission systems. The EPA modified and promulgated the plan; it specified that the I/M program was to be implemented by May 1, 1975. The I/M program required motor vehicles to be inspected annually to determine if their exhaust emitted excessive amounts of pollutants. If they did, the owners would be required to have the necessary repairs made. The Commonwealth sought review of certain aspects of the plan as promulgated, but it did not seek review of either the requirement that it implement an I/M program or the deadline for implementing that program. Pet. App. 20a-21a.

The Commonwealth never implemented the I/M program. In 1976, respondent Delaware Valley Citizens' Council for Clean Air (Delaware Valley) sued petitioners—the Commonwealth and certain state agencies and officials—in the United States District Court for the Eastern District of Pennsylvania, seeking to require them to implement the I/M program. In 1977 the United States also sued petitioners, seeking similar relief. On August 29, 1978, petitioners entered into a consent decree with Delaware Valley and the United States, agreeing to implement an I/M program for certain areas by August 1, 1980. The consent decree was embodied in an order of the court. Pet. App. 21a-22a.

In March 1980, the parties and the court agreed to extend the deadline for implementing the program to May 1, 1981. The Commonwealth failed to meet that deadline. In February 1981, petitioners still had not issued regulations specifying the equipment needed in the I/M program, and it sought a further extension of the deadline to January 1, 1983. The parties could not agree to this extension. In June 1981, the district court, after learning from the EPA that air quality in the areas covered by the decree still did not meet

the specified national standards, and had in some respects deteriorated, refused to extend the deadline. The court then ordered petitioners to submit a plan for the immediate implementation of the I/M program. The court modified that plan and ordered that it be implemented by May 1, 1982. Pet. App. 23a-25a. The court of appeals unanimously affirmed.[1]

## ARGUMENT

Petitioners attack four actions taken by the district court when it ordered the implementation of the plan by May 1, 1982: its requirement that the Commonwealth audit the inspection stations monthly; its requirement that the Commonwealth itself operate two "referee" inspection stations to inspect the vehicles of motorists with complaints about the actions of the other stations, many or all of which were expected to be privately operated; its requirement that the Commonwealth ensure that 3,000 inspection stations were provided; and its refusal further to extend the deadline for compliance with the consent decree.

1. Petitioners repeatedly assert that the requirements imposed by the district court constituted "modifications" of the consent decree. But as the district court (Pet. App. 9a-11a) and the court of appeals (*id.* at 36a-37a, 38a-39a)

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[1]Subsequently, the Pennsylvania legislature enacted a statute prohibiting the expenditure of any funds on the I/M program. On the motion of Delaware Valley, the district court declared the Commonwealth to be in civil contempt and, as a sanction, ordered the Secretary of Transportation not to approve the award of certain highway funds to the Commonwealth. The court of appeals unanimously affirmed this order as well. The Commonwealth has applied for a stay of this judgment of the court of appeals pending the filing of a petition for a writ of certiorari. That application, initially denied by Justice Brennan, was resubmitted to Justice Rehnquist and by him referred to the Court, which has taken no action. A petition for certiorari has since been filed. No. 82-274. However, no question concerning the sanctions is presented by the petition in the present case. See Pet. App. 25a-26a n.5

explained, the consent decree expressly contemplated that the Commonwealth might be required to make monthly audits and to establish two referee stations; the decree explicitly reserved to respondents the right to challenge any alternative measures that were "not as effective as" monthly audits (*id.* at 71a), and it specifically required two "referee" stations unless petitioners devised "an equally effective alternative" (*id.* at 72a). The consent decree also provided (*id.* at 55a):

> Jurisdiction is retained by this Court for the purpose of enabling any party to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for carrying out of this Consent Decree, for the modification or termination of any of the provisions herein upon a showing of changed circumstances and good cause, or for the enforcement of compliance therewith and the punishment of violations thereof.

And as the court of appeals pointed out (*id.* at 26a-27a, quoting *United States* v. *Swift & Co.*, 286 U.S. 106, 114-115 (1932)), even without this provision the district court would have retained the power both to interpret and to modify its order.

The district court, on the basis of submissions by both petitioners and respondents (see Pet. App. 9a, 10a-11a), determined that the alternatives to "referee" stations and monthly audits proposed by petitioners were not equally effective. For example, petitioners proposed that, instead of the "referee" stations, they establish a single central complaints office staffed with inspectors who would be dispatched to investigate complaints; the district court ruled that "common sense" alone dictated that this was not as effective a procedure as two stations operated by the Commonwealth that could themselves conduct investigations.

*Id.* at 10a-11a. Thus, as the court of appeals stated, when the district court required two "referee" stations and monthly audits it "did not increase the obligations to which the Commonwealth had already agreed when it signed the * * * decree" (*id.* at 29a). This case is therefore wholly unlike *Hughes* v. *United States*, 342 U.S. 353 (1952), on which petitioners rely; in *Hughes*, the district court's order violated the terms of the consent decree, imposing on a party an obligation he had specifically not accepted. *Id.* at 356-357.

Petitioners also criticize the district court's decision to decide the issues on the basis of the papers submitted, instead of hearing testimony (Pet. 8-11). Petitioners acknowledge that they had notice that the district court would be asked to impose the requirements at issue here; indeed, petitioners assert that they had obtained witnesses who were prepared to testify about those requirements. Pet. 6. Thus petitioners' only objection is that they were not allowed to introduce evidence in the form they preferred. Such matters are confided to the discretion of the district court, and the court of appeals, relying on its precedent, upheld the district court's exercise of its discretion. Pet. App. 28a-29a.

2. The district court required petitioners to certify 3,000 inspection stations only after learning that 2,274 stations had already been partially certified. Pet. App. 8a. Petitioners assert (Pet. 11-12) that they should be relieved of this requirement because they cannot compel private parties to participate in the I/M program and no state law authorizes them to establish state inspection stations. Pet. 12.

Petitioners made clear in the court of appeals (and do not now deny) that they do not consider 3,000 to be an unreasonable number of stations; in fact, they initially expected to establish 8,700 stations. Pet. App. 40a. The consent decree, by requiring an inspection and maintenance program,

necessarily required that *some* inspection stations be established, and it was within the district court's power to ensure the effective implementation of the decree by designating a reasonable number. As the court of appeals explained (*id.* at 41a-43a):

> The Commonwealth in effect is asserting that the consent decree into which it entered imposed *no* real obligation on it to ensure that vehicle inspections took place and that pollutant emissions were reduced. * * *
>
> Although the requirement that a certain number of inspection stations be certified is not explicitly set forth in the decree, it is necessarily implicit in it. To hold otherwise would turn the decree into an empty promise. When it signed the decree, the Commonwealth must have known that the attainment of the decree's objectives would require a certain minimum number of inspection stations to be established, and that it was the Commonwealth's duty under the decree to see that this was done. * * *
>
> * * * * *
>
> We have no reason to believe that if the Commonwealth set about implementing the I/M program in good faith, the goal of 3,000 certified stations could not be met. * * * We thus hold that the district court did not abuse its discretion in requiring the Commonwealth to certify 3,000 inspection stations by May 1, 1982.

3. Petitioners also contend (Pet. 12-14) that the district court erred in not granting yet another extension of the deadline for compliance, to January 1, 1983. Petitioner asserts that it sought this extension so that it could use a newer emissions analyzer in its I/M program. The district court explained its reasons for not allowing this extension (Pet. App. 2a):

> The new computer analyzer, which is more expensive, is not now available and, though presumably more accurate than the less expensive available analyzer, the degree of added accuracy is neither necessary nor required by the [EPA]. All parties, including the EPA, agree that existing analyzers, which are less expensive for the inspecting * * * stations to buy, are adequate to fulfill the needs of the I/M program.

The district court also noted that the quality of the air in the areas covered by the I/M program did not meet the specified standards and had continued to deteriorate in some respects (Pet. App. 3a). Petitioners gave no assurance that the new analyzer would be available even by January 1, 1983 (*id.* at 33a); the analyzer had not yet been manufactured, even in prototype, at the time petitioners sought the extension (*id.* at 31a). In view of the Commonwealth's already extraordinary delays—the I/M program was originally supposed to be implemented by May 1, 1975—the court of appeals was clearly correct in concluding that the district court did not abuse its discretion in declining to allow a further extension.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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